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# **INTERPRETATION AND THE CONSTRAINTS ON INTERNATIONAL COURTS**

**Marjan Ajevski**



**2012**

# INTERPRETATION AND THE CONSTRAINTS ON INTERNATIONAL COURTS

MARJAN AJEVSKI\*

## 1. INTRODUCTION

The rise of international courts and other types of adjudicative bodies has been paralleled by the rise of interpretation and interpretation talk in international circles.<sup>1</sup> Some would say that that is only natural since that is what courts do, they interpret and apply the law and, therefore, the more cases there are the more interpretation there is. But interpretation also brings with itself a danger for what interpretation does is stoke the fear that judges will, rather than find out the meaning of the words and phrases used in treaties, manipulate the meaning of words in order to further their own personal ends. In order to ward off this possibility, the story goes, judges are required to follow a pre-set methodology or rules of interpretation that will “order and structure their reasoning process”<sup>2</sup> and bind their discretion to the law properly enacted. Most agree that the core of these rules is set out in Articles 31-33 of

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<sup>1</sup> For instance see M. Fitzmaurice, O. A. Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010); Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press 2008); Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) for a review of some of these books see Michael Waibel, ‘Demystifying the Art of Interpretation’ (2011) 22 *European Journal of International Law* 571; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Isabella Van Damme, *Treaty Interpretation by the Wto Appellate Body* (Oxford University Press 2009); Luigi Crema, ‘Disappearance and New Sightings of Restrictive Interpretation(S)’ (2010) 21 *European Journal of International Law* 681; Leena Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21 *European Journal of International Law* 543; Lucas Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’ (2010) 21 *European Journal of International Law* 585; Isabella Van Damme, ‘Treaty Interpretation by the Wto Appellate Body’ (2010) 21 *European Journal of International Law* 605; George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509

<sup>2</sup> Van Damme I, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press 2009) at 381.

the Vienna Convention on the Law of Treaties<sup>3</sup> although some propose additions to those rules (like rules on when and how to use dictionaries in searching for the “ordinary meaning” of a treaty)<sup>4</sup> and that what currently is the main concern is their proper application since in certain instances “they are paid no more than lip service, even giving rise to the suspicion that some lawyers and judges perhaps lack familiarity with their actual content and manner of application”.<sup>5</sup> In short what is currently the rage in international law scholarship is a methodology hope; hope that by having a methodology – a set of predefined rules that forestall the manipulation of interpretation of treaty texts – we will tie the judges’ hand to the meaning of the treaty.

Of course, there is another side to this coin for what some argue is that interpretation of treaties has nothing to do with meaning and everything to do with refining and applying abstract moral principles dependent on the type of treaty in question.<sup>6</sup> In this sense, meaning is something to be given to a treaty text depending on the abstract moral principle in question, and, therefore, what judges should do is reason and argue from the standpoint of abstract moral principles as understood in the context of the application of the treaty.

What this paper will argue is that most authors have missed the point, at least the starting point, and very few<sup>7</sup> have started with the question of what do we do when we do interpretation and what is, in fact, interpretation. It is my contention that by answering this question, what do we do when we do interpretation, will lead us to the conclusion that interpretation is not a methodology bound activity and that no methodology can follow from an account of interpretation. Furthermore, not only that a methodology cannot follow from our concept of interpretation, but that rules or methodologies of interpretation cannot fulfil the role that they have been assigned and in that sense are useless in providing us with the meaning of the text and as such constraining interpretation. However, I will argue that methodologies do constrain interpretation not in the way that they are designed but by their simple inclusion into

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<sup>3</sup> *Vienna Convention on the Law of Treaties*, United Nations, *Treaty Series*, Vol. 1155, P. 331. (1969)

<sup>4</sup> Chang-Fa Lo, ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the Wto Dispute Settlement Understanding’ (2010) 1 J Int Disp Settlement 431; Isabella Van Damme, ‘On ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the Wto Dispute Settlement Understanding’--a Reply to Professor Chang-Fa Lo’ (2011) 2 J Int Disp Settlement 231.

<sup>5</sup> Gardiner RK, *Treaty interpretation* (Oxford University Press 2008) at 7.

<sup>6</sup> Letsas G, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 European Journal of International Law 509.

<sup>7</sup> Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’; Van Damme, *Treaty Interpretation by the Wto Appellate Body* Chapter II.

the practice that we call law and, therefore, being no different than the other doctrines with which this practice is populated, like the *Lotus* principle, countermeasures, prohibition of aggression, self-defence and so on. They constrain interpretation by simply being legal doctrines that have to be invoked or dismissed in a judicial decision for the decision even to be seen as legal and judicial. I base my arguments on the insights of the so called original intuitionists and philosophical pragmatists as applied to interpretation<sup>8</sup> and see how they translate to international law.

The argument in this paper is a straightforward one. It starts by giving an answer to the question of what do we do when we do interpretation. It outlines the main force of the argument – that if communication is to be possible then what a text means is what its author(s) intend it to mean, nothing more and certainly nothing less.<sup>9</sup> The argument then continues by analysing the Report of the International Law Commission on the Draft Articles on the Law of Treaties<sup>10</sup> and shows that the writers of the Report had the similar basic idea in mind (that it is the intentions of the parties that an interpreter is supposed to pay attention to and discover) and that the Commission in its report was more concerned with answering a different set of questions (what makes an authoritative interpretation, what makes up the best evidence of the parties' intentions, what makes a "legally relevant interpretation"<sup>11</sup>)

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<sup>8</sup> Steven Knapp and Walter Benn Michaels, 'Against Theory' (1982) 8 *Critical Inquiry* 723; Steven Knapp and Walter Benn Michaels, 'Against Theory 2: Hermeneutics and Deconstruction' (1987) 14 *Critical Inquiry* 49; Steven Knapp and Walter Benn Michaels, 'Not a Matter of Interpretation' (2005) 42 *San Diego L Rev* 651; Walter Benn Michaels, 'A Defense of Old Originalism' (2009) 31 *Western New England Law Review* 21; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989); Stanley Fish, 'There Is No Textualist Position' (2005) 42 *San Diego L Rev* 629; Stanley Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 *Cardozo Law Review* 1109; Larry Alexander and Salkrishna Prakash, '"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility' (2005) 41 *San Diego L Rev* 967; Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism' (1982) 9 *Critical Inquiry* 201; Stanley Fish, 'Short People Got No Reason to Live: Reading Irony' (1983) 112 *Daedalus* 175; Stanley Fish, 'Wrong Again' (1983) 62 *Texas Law Review* 229; Stanley Fish, 'Fish V. Fiss' (1984) 36 *Stanford Law Review* 1325; Stanley Fish, 'Still Wrong after All These Years' (1987) 6 *Law and Philosophy* 401; Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press 1994); Stanley Fish, *The Trouble with Principle* (Harvard University Press 1999)

<sup>9</sup> Knapp and Michaels, 'Against Theory'; Knapp and Michaels, 'Against Theory 2: Hermeneutics and Deconstruction'; Knapp and Michaels, 'Not a Matter of Interpretation'; Michaels, 'A Defense of Old Originalism'; Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, 'There Is No Textualist Position'; Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'; Alexander and Prakash, '"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility'

<sup>10</sup> International Law Commission, 'Report of the of the International Law Commission on the Work of Its Eighteenth Session' in *Yearbook of the International Law Commission*, vol II (1966)

<sup>11</sup> *Ibid* at 220 para. 8.

than the question of what do we do when we do interpretation or what is interpretation. If that is so, then the Vienna Convention rules of interpretation (as well as the other rules that are left un-codified) turn out to be more useful as rules of writing texts and especially of rules of arguing for an authoritative (convincing) interpretation, rather than of rules on how to interpret a text. From thereon, I analyse some of the recent scholarly contributions to the interpretation debate and point out of the wrong headedness of thinking of judging as synonymous of interpretation—where the interpreter has a free choice between multiple meanings of a text – and still be able to call oneself an interpreter and how this misconception misdirects our inquiry of the constraint of judging in the direction of rules and methodologies of interpretation rather than the direction of legal conceptions, institutions and processes.

Before I go into my argument I would like to make one caveat clear. My argument is not an indictment of the way that international tribunals and other quasi-adjudicatory bodies go about the everyday business of settling cases. It is not even intended to strike a note with practitioners of the judicial field for this paper is an academic exercise and it strives to explain and contextualize the practice of what most of international scholars call interpretation (which is something that I would not do) and emphasize that our current understanding in calling almost all outcomes of what international courts and quasi-judicial bodies do as interpretation, rather than judging (of which interpretation is just one part) has consequences in the very necessary inquiry of what constrains the normative power of courts and quasi-judicial bodies in the international system.

## 2. WHAT DO WE DO WHEN WE DO INTERPRETATION: THE SEARCH FOR INTENTION

“‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean -- neither more nor less.’

‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’

‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’”<sup>12</sup>

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<sup>12</sup> Lewis Carroll, *Through the Looking-Glass and What Alice Found There; Illustrated by John Tenniel* (Macmillan, St. Martin's Press 1972) at 130.

The discussion that Alice has with Humpty Dumpty is a great introduction into the topic that I wish to explore in this section, for a great many things hinge on the answer to the question “which is to be the master” of meaning. And in the discussion about interpretation and language most<sup>13</sup> participants have chosen one of the following answers to the question:

(1) A text, legal or otherwise, means what its author or authors intend. (2) The text itself, unless it is carelessly drafted, contains sufficient clues to its own meaning and should therefore be both the beginning and the end of inquiry (with legislative history and other “external” sources of information piecing out a middle if necessary). (3) The text means what those who ratify and/or interpret it take it to mean at the time of interpretation.<sup>14</sup>

Needless to say, I am arguing for the first answer and believe that the other two answers are an impossibility; they are an impossibility because they forget what the purpose of language is. To understand interpretation is to understand that language is socially constructed and serves as a vehicle for communication. Language is a constructed code, a wide-spread code, a code known to a lot of individuals but a code nonetheless, one through which we try to establish communication and convey meaning. Notice that for communication to be possible the only one who can give a meaning to an utterance is its author; otherwise we would not be communicating but rather talking at each other. In that sense a text, an utterance, a speech act has “only one meaning, and [...] whatever that meaning is, it never changes.”<sup>15</sup> A speech act receives its meaning the moment it is produced and that meaning is the meaning its author gives it, in short, what its author intends it to mean.<sup>16</sup> And this is the answer to Humpty Dumpty’s tease, “which is to be the master”, for if communication is to be possible at all, the master of the meaning of a speech act (a text, an utterance, a song) has to be its author and not its interpreter or an object that cannot even declare itself to be an object (a text) absent a purposeful

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<sup>13</sup> Some have chosen all three *see* Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’

<sup>14</sup> *Ibid* at 1116.

<sup>15</sup> Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’ at 68.

<sup>16</sup> Generally *see* Knapp and Michaels, ‘Against Theory’; Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’



creator.<sup>17</sup> Where the problem of arises is not in the question of what an utterance means since it means whatever the author intended it to mean but whether and more specifically of how can we know the authors' intentions (but for this a little bit later in the paper).

And this is ultimately where the other two options fail for they presume that there is a difference between what an author means and what the text means.<sup>18</sup> One set of answers is that a text means what the rules of language (semantic, syntax, grammar etc.) make it mean. Unfortunately, the rules of language produce multiple meanings for the same words, and there is nothing intrinsic in the words themselves, even when used in a sentence, that would give you a good enough clue as to what that word or sentence means. Therefore, text alone cannot determine a meaning, and an interpreter is forced to look to extrinsic evidence to settle the meaning of a text.

And this is where the other set of answers come into play for they claim that because a text, even taken together with the rules of language, cannot point you to a meaning – they cannot provide you with a single meaning just a catalogue of possible meanings – it is the interpreter that ultimately gives the text (utterance, speech act) its meaning. But if this is the case, if the rules of language cannot give us a meaning and if, in the end, it is the interpreters that give a text its meaning then there is no reason to think that any interpretation is “right” or “wrong”<sup>19</sup>, there is no reason to argue with someone that she has got it wrong, no way to proceed in an argument about a texts' (utterance, speech act), even a legal text's, correct meaning for the meaning of the text will be whatever the interpreter decides it to mean. If the text (and the rules of language) is not the template against which we measure an interpretation (and if we discard the authors' intention) then there is no way to argue that an interpretation is a right one or a wrong one (which we clearly do argue about), interpretation just is. And if the meaning of a text, utterance, speech act (conceptually) is always given by the interpreter, then there is no way to communicate, for we would not care what one says to us but what we (can) make of what one says to us and that would mean that we would be talking at each other and not conversing with each other. In this sense, language, utterances, words and their semantic meaning are

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<sup>17</sup> Generally see Alexander and Prakash, “Is That English You're Speaking?” Why Intention Free Interpretation Is an Impossibility”; Fish, ‘There Is No Textualist Position’; Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law’; Knapp and Michaels, ‘Not a Matter of Interpretation ’; Michaels, ‘A Defense of Old Originalism ’

<sup>18</sup> Knapp and Michaels, ‘Against Theory’ at 723-724.

<sup>19</sup> Ibid



nothing more than vehicles for the authors meaning and if we understand them as anything else – as objects that have their meaning or on which meaning can be thrust upon independent of an author and her message – then we are forgoing interpretation and doing something else. In the next four subsections I will give some examples of how these two approaches, the text (and rules of language) or the interpreter as the ones who give a text their meaning, fail.

### **2.1. A Text Cannot Declare the Language it is Written in<sup>20</sup>**

Not long ago, a friend of mine (an English speaker) went to visit his friend in Bulgaria. In his first tour of the capital he noticed the following writing – PECTOPAH – on almost every establishment where you could sit down and order hot food and beverages. My friend asked his friend whether there was a monopoly in the restaurant business by this PECTOPAH company at which point his friend had a long laugh before telling him that the word PECTOPAH is the Bulgarian word for a restaurant. It is not hard to imagine how my friend could have gotten the meaning of the word PECTOPAH so wrong, for it is not unusual in Bulgaria (as in other countries) for businesses to have names spelled in more than one language or to have it spelled in a language that is not the language of the country. The confusion becomes obvious once one understands that in the Bulgarian alphabet the letter “R” is written “P”, the letter “S” is written “C” and the letter “N” is written “H”. There was nothing intrinsic in the text itself that could give a clue to my friend about the language it was written in and for all he knew there might well have been a company in the world that was named “Pectopah” that happened to establish a monopoly in the restaurant business in Bulgaria’s capital after the fall of communism, or that “Pectopah” was the name for a state run company that has continued its monopoly after communism. Notice that neither the text nor any rules of either language (English and Bulgarian) can settle the issue of in which language PECTOPAH is written in. Only by looking at extrinsic evidence (like the fact that my friend was in Bulgaria, and the fact that the sign was so ubiquitous in the capital) we can settle the issue of what PECTOPAH means. An even when we find out that in Bulgarian the

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<sup>20</sup> The structure of this section mirrors the one given in section one of Alexander and Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility’

word restaurant is spelled PECTOPAH, we still cannot exclude the possibility that somebody in Bulgaria, for whatever motive (because she thinks she is being funny or sarcastic, or because she has a dislike of British tourists etc.) may have named his restaurant “PECTOPAH” using the Latin alphabet as the basis for the name. And the only way in which we would be able to discern her trick, her attempt at a joke, is by looking at her intentions, for absent an intention a word cannot have meaning, it would be a mere production of marks on a white surface, while with the presence of an intention those same marks acquire a meaning, a meaning that could be a more pedestrian one (type of business establishment) or a play of words, a joke, a pun, irony and so on and so on.<sup>21</sup> And the only way to discover whether the writing on the wall is meant to convey a signal of a type of an establishment or an ironic name for a business is to look for evidence of the writer’s intentions for only that can give us the meaning of the word, for a meaning of a word is what its author intend it to have. Whether her attempt at a joke, a pun, irony would be understood by anybody is a different matter altogether, for failure to communicate is always a possibility, but failure to communicate does not equal a failure to mean, for we can give meaning to an utterance without it ever being understandable to anybody:

In one sense the claim that intention cannot govern the scene of utterance seems to us correct. Even if, as we have argued, intention determines meaning, there can be no guarantee that the intended meaning will be understood. To say that the author cannot govern the scene of utterance is only to say that the author cannot enforce communication. A speaker or writer can always fail to communicate; misinterpretation is always possible.<sup>22</sup>

Alexander and Prakash have similar examples in their paper on interpretation<sup>23</sup> the typical one being the word canard. For instance,

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<sup>21</sup> For the problems that arise out of trying to distinguish an utterance as ironic and its “normal” meaning see Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’ at 54-55; Fish, ‘Short People Got No Reason to Live: Reading Irony’;

<sup>22</sup> Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’ at 61.

<sup>23</sup> Alexander and Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility’ at 974-975

One cannot attribute meaning to marks on a page or to sounds without reference to an author, actual or idealized, who is intending to communicate a meaning through the marks or sounds. Consider the question of how to identify the relevant language of some communication. IF [intention free] textualists cannot explain how they identify the language of the text they wish to interpret. Apparently, they assume that identifying the relevant language is unproblematic. Seeing the word “canard,” an IF textualist who speaks English will assert that the word means “fib.” After all, that is the ordinary, public meaning that would come to mind for the well-informed, reasonable English speaker. But a French textualist will attribute a different meaning to the word. To the French IF textualist, “canard” clearly means “duck” because that is the ordinary, public meaning for the well-informed, reasonable French speaker. Which of these IF textualists is right? We believe that IF textualists cannot meaningfully answer this question.

[...] Our claim is that we must posit the existence of some author if we are to attribute meaning to these statements. If we know the real author of “canard” generally speaks French, we most likely would conclude that “canard” in this context means “duck.” If the author usually speaks English, we most likely would conclude that it means “fib.” If we are unaware of (or indifferent to) the author's usual tongue (and likely intentions), we may imagine what we would have meant had we spoken the term, imagining ourselves as the authors.<sup>24</sup>

Consequently, a text in and of itself cannot declare even in what language it is written in since one always has to postulate an author, a speaker of a specific language who has authored the text in order for one to see something as a text.

## **2.2. Texts Cannot Declare That They Are Texts**

Without a reference to an author, real or imagined, one cannot attribute meaning to marks on a page, sounds on the radio, pixels on a computer monitor. To understand how difficult it is to imagine text without also having in mind an author, let us suppose that one morning a religious man comes knocking on the door of his

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<sup>24</sup> Ibid

friend (who is an atheist) telling her that he has some wonderful news, he has discovered the face of Jesus in a piece of toast and that all arguments about the existence of God between them must now cease since the toast is God's way of sending them a message that he/she exists. Setting aside matters of whether the atheist will see the piece of toast as a message or not, or whether she would be able to see the face of Jesus in the toast at all, the only way that the religious man in our example can see the face of Jesus in the toast and, moreover, can see it as a message, is to suppose that it was created by God (the Judeo-Christian deity), a purposeful being capable of having intentions and having meaning, and therefore, capable of communicating. Without having in mind something being created by a purposeful agent, an agent capable of having intentions, we cannot even see something as a text, an utterance, a speech act and cannot distinguish it from something that we write on a screen just to test whether we would like the font, or between words uttered and mere throat clearings.<sup>25</sup> "Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language."<sup>26</sup>

But this is exactly what defenders of the text and the rules of language as determinative of the texts' meaning try to defend. "Men may intend what they will, but it is only the laws they enact which bind us"<sup>27</sup> as it was so elegantly put by Justice Scalia. Another elegant example of this is given by Justice Scalia in his review<sup>28</sup> of Steven Smith's book *Law's Quandary*<sup>29</sup>

If the ringing of an alarm bell has been established, in a particular building, as the conventional signal that the building must be evacuated, it will convey that meaning even if it is activated by a monkey. And to a society in which the conventional means of communication is sixteenth-century English, *The Merchant of Venice* will be *The Merchant of Venice* even if it has been typed accidentally by a thousand monkeys randomly striking keys.<sup>30</sup>

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<sup>25</sup> Fish, 'There Is No Textualist Position' at 632-633.

<sup>26</sup> Ibid at 632.

<sup>27</sup> Justice Scalia as quoted by Stanley Fish in Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'

<sup>28</sup> Antonin Scalia, 'Law & Language (Review of Steven Smith's *Law's Quandary*)' (2005) November 2005 First Things

<sup>29</sup> Steven D. Smith, *Law's Quandary* (Harvard University Press 2004)

<sup>30</sup> Scalia, 'Law & Language (Review of Steven Smith's *Law's Quandary*)' at 37.

To a subscriber of intention free interpretation this would be the ultimate argument, for to understand a meaning of a text, one should try to figure out the public meaning of the words (which we all know don't we?) that are used, and if find out that the author meant something else than the standard public meaning then we should ignore that finding for what we text can mean is only what the rules of language allow it to mean.

However, there is a problem with this account of discovering meaning. First let me get back to Scalia's alarm-bell-by-monkey example. The simple answer to this challenge is that "the bell would not convey a meaning if those who hear it know that a monkey has activated it, any more than it would convey a meaning if they know that it has been activated by a picture falling off a wall."<sup>31</sup> No intention behind the turning on of the alarm (since we do not consider monkeys to be intention wielding agents), no meaning to convey, it is simply mere noise, nothing to be "alarmed" about. However, if the people hearing the alarm bell know that that monkey that has pushed the button has also been trained to do so in the case of smoke then they would understand the meaning of the alarm bell as a signal to leave the building for this time they would not be understanding the public meaning of the noise produced by the alarm bell but the meaning given to the alarm by the monkey's trainer for both the monkey and the alarm bell are the vehicles of the trainer's intentions and her meaning (just like marks on a piece of paper) to alert people of the dangers of fire in the building.<sup>32</sup> No intention behind a mark, no meaning for that mark to convey even if that mark happens to look like the writing on a wall. Similarly with the Merchant of Venice written by a monkey or monkeys by striking keys blindly on a typewriter (given world enough and time a monkey on a typewriter could "write" the Merchant of Venice) for the text absent Shakespeare would not be recognizable as the Merchant of Venice for the Merchant of Venice is a play written by an intention wielding person. Without Shakespeare we would not have a Merchant of Venice but a text generated by monkeys at random that may and could mean anything. Absent Shakespeare there is no Merchant of Venice for without some presumed author (fate, destiny, God/s, Muses, spirits of the ancestors, nature) how do we start to unravel what the play means (or even if it is a play at all):

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<sup>31</sup> Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'

<sup>32</sup> This example is taken from *ibid* at 1111

is it a political pamphlet of Elizabethan times, a social commentary, an anti-Semitic writing, an accident of nature never to be repeated?<sup>33</sup>

### **2.3. Meaning Cannot Be Autonomous from Intent – One Must Always Identify an Author**

Let's continue the story of the two friends and their dispute over the meaning of the mark on the toasted piece of bread. For the atheist the burned marks on the piece of toast may resemble a face but she is still not convinced that the burn marks are a picture of Jesus. During their discussion she learns that her friend has bought his new toaster from a novelty store which sells a limited edition of toasters. They then decide to go to the shop and ask the person that makes the toasters for some more information. He then tells them that yes the shape on the toast bread is a representation of Jesus, or the best representation that he could make it. He further explains that the toasters are meant to be sold as jokes – a proverbial whoopee cushion – that people can give to their friends. At this point both our friends agree that the shapes on the toasted bread is the face of Jesus but they also agree that the face is not there as a message that God exists, but as a message that mocks the faithful of a certain religion. The only reason why both our friends can acknowledge that the burned marks represent the face of Jesus is because they have found the intention behind the burned marks, the intention of the author of that message (the maker of the toaster) and his intention is to mock the sensitivities, the intelligence, of the faithful. Therefore, the burned piece of toast with the face of Jesus on it is a vehicle of the author's (the toaster maker's) intention to have fun (in a rather cruel way) on the expense of the faithful of a certain religion.

However, let's now suppose that the person who made the toast machine told our two friends that he did not intend to make a toaster that would burn faces of Jesus in the bread but that the novelty of the toaster was to be the LED flashing lights around the toaster that would signal that the bread is ready. This discovery would put our friends back at square one, since for the deeply religious person, the burn marks on the bread would be the face of Jesus (with God as the author), and for the atheist the burn marks would be just that burn marks, for even though they may

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<sup>33</sup> Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too*; Fish, *The Trouble with Principle*  
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resemble the shape of a face (our brain can be funny like that)<sup>34</sup>, they certainly do not represent the face of Jesus and they are certainly not a message from God and the burn marks are the products of a freak accident or a strange alignment of the heating coils because for our atheist God does not exist; therefore, no purposeful author capable of having meaning, no message to communicate, no meaning, just oddly burned bread. Of course our atheist can say that the burn marks on the bread represent the picture of a man's face, but she would not see the face as a message, as something that has and conveys meaning for no author capable of communicating a meaning is behind the burn marks. No author able to intend something, no author, no meaning, nothing that the toasted bread can "say" to her, it is simply something it resembles, an accident of nature.

#### **2.4. Texts Can Have "Deviant" Meanings Because Those Meanings Are Intended**

One of the problems that the proponents of the "text has its own meaning" stream of thought, is to explain how did all those different meanings in a dictionary come about. If the semantic meaning of words was a stable notion, if they had a core settled meaning then, surely, dictionaries, for example, would not have so many different entries under the same heading, nor would those same entries be pointing so far off topic of each other (what is the core here?). However, if one takes seriously the notion that language is a communal creation for the purposes of communication and if the meaning of speech acts is given by their authors, then language, and by extension dictionary meanings, would be the sum total of all speech acts. If words have the meaning that its authors give them (intend them to have as I and others claim) then all entries in the dictionary are an assemblage of the meanings that various authors have given different words over the years, ordered by the frequency of usage (the top entry being most frequently used and so on down the list to the least used meaning).<sup>35</sup> A dictionary is nothing more than a statistical record, a

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<sup>34</sup> For an example of the brain tricking us to see something that is not there *see* [http://www.youtube.com/watch?v=OHuStlT1RM8&feature=youtube\\_gdata\\_player](http://www.youtube.com/watch?v=OHuStlT1RM8&feature=youtube_gdata_player) (last visited 8 November 2011).

<sup>35</sup> Knapp and Michaels, 'Against Theory'; Knapp and Michaels, 'Against Theory 2: Hermeneutics and Deconstruction'; Fish, 'There Is No Textualist Position'; Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'; Alexander and Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility'



difficult one to compile for sure, but a statistical record nonetheless. New words get included and older ones get relegated to historical meanings all the time.<sup>36</sup>

To have a clearer picture of how texts or words can have deviant meanings one only has to spend an hour with a group of teenagers to notice that certain words are used to assign meanings that might even be opposite from the normal, dictionary meanings, like the omnipresent “wicked” that now means “good,” “great,” “terrific,” “cool”, so much so that Microsoft Word now gives me these options as synonyms of the word “wicked” and not antonyms and does not give me any of the meanings one can find in the Oxford English Dictionary<sup>37</sup> for example (which maybe an indication of Microsoft’s marketing strategy of selling Microsoft Word to young people rather than the clergy). Moreover, to imagine a different situation is to imagine that words and language have an independent meaning other than the meaning that its authors give them; is to understand them as a source of meaning (independent of an author) rather than good evidence of what an author’s speech act means;<sup>38</sup> it is to imagine that they have an existence and meaning prior to and outside of any communicative context; is to imagine that they are objects of Reality no different than the Sun or the Moon, object(s) for which we have found use for (like e.g. sharp stones for use of axe heads), but have not ourselves created.<sup>39</sup> Unquestionably, words have been used with a specific meaning with enough of a frequency for us to have a good idea that when one says “wicked” one means evil. They have created reliance, the same way that a certain code has created a reliance among an intelligence community so that the communication between the members of that community (the CIA let’s say) will remain known only to the members of that community. For that is what language

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<sup>36</sup> For instance the usage of a popular United States comedian of the word Truthiness has been added to the New Oxford American English Dictionary with the rough meaning of “[t]ruth unburdened by facts” see Ben Zimmer, ‘Truthiness’ *The New York Times Sunday Magazine* (New York, October 13, 2010) at MM22 but also see the methodology of the Oxford English Dictionary at <http://www.oed.com/public/collecting/collecting-the-evidence#programmes> (last visited on May 5, 2012).

<sup>37</sup> See the entry under “wicked” in the Angus Stevenson and Maurice Waite, *Concise Oxford English Dictionary* (12th ed. / edited by Angus Stevenson, Maurice Waite. edn, Oxford University Press 2011)

<sup>38</sup> Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’ at 68.

<sup>39</sup> For one such an account of language and literary theory see lectures 24 and 25 of the Yale online lectures of Paul H. Fry, *Course in Literary Theory* available at <http://academicearth.org/courses/literary-theory> (last accessed 8 November 2011).

ultimately is, a code that is widely known and used as a vehicle for communication,<sup>40</sup> one we can opt in or out of using.<sup>41</sup>

This is what ultimately leads us back to the Humpty Dumpty example, for Alice asks a very interesting question: “whether you can make words mean so many different things.”<sup>42</sup> And the simple answer is yes, for Humpty Dumpty had the right question since the important question when it comes to understanding what we do when we do interpretation is not whether words can be made to mean so many different things (they can), but what or who gets to shape the meaning of words (which is to be the master), and I hope by now the answer is clear, it is the author. Certainly, some would say, and author cannot just say anything, mumble a sound and still be taken as having a meaning, an author cannot just say “gobbledegook” and mean “would you be so kind as to pass me the salt please.” Can “gobbledegook” ever mean “would you be so kind as to pass me the salt please?” And the simple answer is yes, so long as that is what the author intended it to mean. The more relevant question here is not whether “gobbledegook” means “would you be so kind as to pass me the salt please” but whether we would be able to understand “gobbledegook” as to mean “would you be so kind as to pass me the salt please” for this is a separate question, for the first question is a conceptual one: what does an utterance (text, speech etc.) mean (it means what its author intends it to mean) and the second is an empirical one – whether we would be able to discover an author’s intention and therefore the utterance’s meaning<sup>43</sup> – and its answer depends on whether we have or do not have enough evidence of the authors’ intentions. The second question is an empirical one because of a simple fact, intentions are no more easily graspable, no more immediately identifiable than the text itself, for they too need to be interpreted, need to be searched for, and – when trying to convince others of one’s interpretation of a text – need to be argued for (or argued against). Intentions do not reveal themselves to us any more readily than the ordinary and plain meaning of a text. It is a question of whether the person uttering “gobbledegook” failed to

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<sup>40</sup> Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’ at 1122-1124.

<sup>41</sup> Opting in or out of using public, known-to-everybody language does not mean that we have failed to give a speech act a meaning but that we have opted for creating a speech act with a meaning that might not be easily understood by anybody else for we may have opted in for a code that is only known to one person, the author. This does not mean that we have failed to mean, just that we have failed to communicate.

<sup>42</sup> Carroll, *Through the Looking-Glass and What Alice Found There; Illustrated by John Tenniel*

<sup>43</sup> See Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, ‘There Is No Textualist Position’; Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’

communicate her intention and not whether she failed to mean for she meant exactly what she intended, nothing more and nothing less and she meant “would you be so kind as to pass me the salt please”.

At last, what is the answer to the question what do we do when we do interpretation? And the short answer is we search for the authors’ intention, for what a speech act means is what its author intends it to mean. Unfortunately for law and lawyers, the consequences of this realization is that there are no consequences, at least no consequences to the way that one goes about interpreting, for it gives you the answer of the question what do you do when you interpret (search for intentions) and does not give you a way how to do it, how to find intentions, does not tell you what counts as evidence for intention, let alone what counts as good evidence for

[i]t has no imperative; it doesn't go anywhere; it just specifies where you already are when you try to figure out where to go next. You already are operating within the assumption of something designed (intended), for if you were not – if you regarded what was before you as an object rather than as a message – there would be no reason to assign it a meaning, or (and this is the same thing) no reason to reject any meaning someone wanted to assign it. It would function as a Rorschach test.<sup>44</sup>

### 3. THE EMPIRICAL QUANDARY

The fear of a Rorschach test, when it comes to interpretation, is very real in the legal community. To understand the problems that lawyers face when trying to interpret a legal texts let me name some of the difficulties in figuring out what a legal text (statute, law, treaty) means (it means what its authors intend it to mean). When it comes to legal enactments several questions often arise: whose meaning (whose intentions) are the ones that should dominate: is it the intentions of the administrators that wrote the legislative text? Is it the intention of the ones who enacted the legal text or the ones who ratified it? What happens when the intentions

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<sup>44</sup> Fish, ‘Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law’ at 1114.

of the authors (it is normal in law for there to be more than one author) do not coincide, whose intention (and therefore whose meaning) is to prevail?

And if the questions of whose intention are we to take seriously are not hard enough, we are still faced with the question of what counts as good evidence of intention. Is the published memoirs of a diplomat who was present at the negotiations of a treaty good evidence of the parties' intentions; is the travaux (and the statements of governments contained within it) good evidence of the parties' intentions; and what about the statements of NGOs monitoring the negotiation and ratification process; the interpretative statements appended by various parties in the process of ratification; scholarly or newspaper articles contemporary to or pre/post-dating the negotiations of the treaties; the text of the treaty itself, subsequent statements (practice) of the parties; statements of the international organization created by the treaty or entrusted by the treaty to perform a certain function etc., etc., etc.

And this is where the concept of interpretation does not give any answers to these questions, for the answers to these and other similar questions is not an answer to the question what do we do when we do interpretation (we search for the intention of the parties) but an answer to the question what makes an authoritative interpretation - what makes an interpretation the right one – and this is an empirical question. It is an empirical question because it ultimately asks and answers the question: is this credible, believable, evidence of the intention of the parties and it is this question that the Vienna Convention and its Commentaries ultimately strive to answer by giving a single rule of interpretation through which one can assess what is an is not an authoritative interpretation. However, this choice of the drafters of the Vienna Convention does have consequences, not for the way we interpret (discover the meaning of a text) but for the acceptance of our interpretation for if the criteria for a “legally relevant interpretation”<sup>45</sup> is the one set out in Articles 31-33 then an authoritative interpretation is the one that is argued through the lens of the VCLT rule of interpretation.

### **3.1. The Commentaries to the Vienna Convention and Interpretation of Treaties**

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<sup>45</sup> International Law Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ in *Yearbook of the International Law Commission*, vol II (United Nations 1966) at 220 para. 8.

The Commentaries to the VCLT are a useful starting point in contextualizing the proper role of the Article 31-33 VCLT rule for interpretation for they support both textualism – by giving primacy to the text of a treaty – and the notion of interpretation as a search for the intention of the parties. This apparent tension will be explained later in the paper but for now let’s start with the Commentaries’ choice to give primacy to the text. The Commentaries start their discussion on interpretation by categorizing the various basic approaches to interpretation (the text, the intentions of the parties and the object and purpose of a treaty),<sup>46</sup> noting that “[t]he majority [of jurists] [...] emphasizes the primacy of the text as the basis for interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intention of the parties and the objects and purposes of the treaty as a means of interpretation.”<sup>47</sup> Furthermore, in giving reasons why that specific rule of interpretation was chosen and not another (which eventually became article 31 of the VCLT) it said that “having regard to the divergent opinions concerning the methods of interpretation, it seemed desirable that the Commission should take a clear position in regard to the role of the text in treaty interpretation”<sup>48</sup> and that “[...] the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”<sup>49</sup>

Nevertheless, one should not read into this as a full blown endorsement of the “textualist” methodology of interpretation, for the Commission was, on several occasions, clear that the endorsement of the text as the primary step in interpretation was only because of its belief that the text represents the best evidence of the intention of the parties. For instance, when starting to explain the rationale behind what is now the Article 31 rule, the Commission said that

[it] is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting

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<sup>46</sup> Ibid at 218 para. 1.

<sup>47</sup> Ibid at 218 para. 2.

<sup>48</sup> Ibid at 219 para. 5

<sup>49</sup> Ibid at 220 para. 11.

point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. [...].<sup>50</sup>

Moreover, when discussing the previous use of maxims and principles of interpretation it stated that “[t]hey are, for the most part, principles of logic and good sense, valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions they employed in a document.”<sup>51</sup>

However, and as I have pointed out earlier, adherence to strict textualism is not enough in itself, for a text on its own cannot resolve the issues of its meaning and therefore, extrinsic evidence for the text’s meaning must be sought – enter the other two principles endorsed by the Commission: “*context, and object and purpose*”, for it is, or so the Commission hoped, the combination all of the three principles (text, context and object and purpose) that would give the correct expression to the intentions of the parties.

The Commission, by heading the article “General rule of interpretation” in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.<sup>52</sup>

Unfortunately, the Commission also decided to be very restrictive regarding its choice of context for if context is to provide evidence for the affixed meaning of a text (by providing evidence of the intention of the parties) then there is no reason to exclude any probative evidence of the parties’ intention regardless of the type of document in which it is found. However, for the Commission the only acceptable items of context are only those that “not only [were they] made in connexion with the

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<sup>50</sup> Ibid

<sup>51</sup> Ibid at 218 para. 4

<sup>52</sup> Ibid at 220-221, para. 8.

conclusion of the treaty but its relation to the treaty was accepted in the same manner by the other parties",<sup>53</sup> where the fact of the shared acceptance by the parties is far more relevant than the fact of the documents' probative value. The balancing act that the Commission is trying to achieve is commendable, for ultimately what it is trying to achieve is the standardization of the sources of evidence of the parties' intentions and thereby achieving a greater degree of predictability and certainty in outcomes rather than veracity to the parties intentions, and therefore to the respective treaty's meaning.<sup>54</sup> It is sacrificing the meaning of the respective treaty or its specific provisions to a specific idea of the rule of law for which the typical argument would go something like this:

the interpreter should seek out authorial intent, but in doing so should refuse to consider certain kinds of evidence thereof, even if reliable. For example, we might have reliable evidence that a law, which appears to be written in standard English and which can be given a sensible meaning therein, was actually written in nonstandard English, or Schmenglish. We could imagine an interpretive norm to the effect that lawmakers will be irrebuttably presumed to use standard English in writing laws. We might tell a rule of law story about the justification of such a norm, such as the need for the general public to know the laws, and so forth. And we might give a similar rationale for excluding even reliable legislative history – that is, that such history is not generally available, or that it can lead to nontransparent manipulations of the lawmaking process.<sup>55</sup>

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<sup>53</sup> Ibid at 221, para. 13.

<sup>54</sup> It seems that, from a contemporary perspective, the requirement of paying attention to context, or that context matters is an overstatement since the Critical Legal Studies movement, feminism and other writings that can generally be deemed postmodernist have convincingly pointed out not only that we are always situated within a context, but that that context also frames the perspective from which a judge sees a case, which explains why in a given case different judges may link the case to different contexts (including different lines of precedents, for example) see Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Clarendon Press; Oxford University Press 1997) at 38-40. However, the Commission here is not making an epistemological statement – is it not telling interpreters to be aware that they are already and always operating within a context – but rather narrowing the interpreters' options of contexts to ones that have the pedigree of legitimacy i.e. approved by the parties of the treaty.

<sup>55</sup> Alexander and Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility' at 983.



And this is something that the Commission does; it presumes that the text is an authentic expression of the intentions of the parties and that the terms in it should be read as having their ordinary meaning. This ordinary meaning can then be tested against the background of a context which includes documents that are accepted (acceptable) by most if not all of the parties, and just in case the interpreter might have arrived at a meaning that does not do justice<sup>56</sup> to the object and purpose of the treaty then that should be discarded in favour of one that does. In this sense, the Commission is trying to give at least three reference points with which the interpreter is supposed to check her interpretation: the ordinary meaning of the words, for which the word “ordinary” stands for those meanings used in the specific project that the treaty is suppose to further (if it is a trade law treaty then read the terms with the meanings that are usual in trade circumstances i.e. context) and that fits best with the goal that the parties wished to achieve with the treaty (object and purpose). One commentator on the general scheme of the ILC approach to interpretation wrote that

The ILC adopted a combination of the literal and teleological approaches, viewing application of these as yielding up the intention. [...] but the general significance of the approach is that by combining considerations of all relevant elements mandated by the Vienna rules, the resulting interpretation should achieve due respect for the intentions of the parties as recorded in the treaty text, taking account of the treaty’s object and purpose, but without making a wide-ranging search for intentions from extraneous sources.<sup>57</sup>

However, this position may have the consequences that if an interpreter follows these rules she may have to disregard the meaning that the parties originally affixed to the text for she might have to disregard some credible evidence of the parties’ intentions because it is not found in the Article 31-32 VCLT approved sources of evidence. Nevertheless, this may not be such a terrible outcome after all for if stability and predictability of outcomes rather than complete veracity to the meaning of a text is what you are after then the VCLT rule on interpretation might give you

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<sup>56</sup> And what does justice to the object and purpose of a treaty is unclear unless one takes in even more extrinsic evidence.

<sup>57</sup> Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press 2010) at 8.

just that. Having predictable standardized rules(s) and processes for giving a meaning to a text can accomplish this for “if our interpretive norms exclude certain kinds of evidence of lawmakers’ intentions, the lawmakers will legislate in light of those norms, thereby narrowing the gap between the meaning they actually intend and the meaning that they will be deemed to have intended.”<sup>58</sup> And this is partly what the Commission was expecting to happen since it says that “[i]n addition [,] the establishment of some measure of agreement in regard to the basic rules of interpretation is important not only for the application but also for the drafting of treaties.”<sup>59</sup>

Notice, however, that once we move away from searching and arguing for the intentions of the parties we have moved away from interpreting, for if interpretation is the process by which we discover the meaning of a speech act assigned to it by the author, then the moment we move away from the authors intentions (and that is what the rule of interpretation in the VCLT ask as to do for it asks us to disregard credible evidence of authorial intention) we move away from interpretation. If we are not searching for authorial intention, or if we assign intention to someone or something other than the author (the ordinary man on the street, an idealized/perfect writer or reader,<sup>60</sup> God or any other deity, spirit, muse etc., etc., etc.), we are no longer doing interpretation but writing/creating new texts and substituting them for the original authorial meaning. In that sense we have written the new meaning of the treaty even though we have used the same black marks on white paper as the previous author(s).<sup>61</sup>

To better understand how it would be possible for the same marks on white paper (the “same” text<sup>62</sup> as it were) to have different meanings over time and space let me give you an example of Vergil’s *Fourth Eclogue* and how it was read in the Middle Ages, since Christians in the Middle Ages read Virgil’s poems – and most other poems for that matter, even the ones written before the birth of Christ (like

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<sup>58</sup> Alexander and Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility’ at 983-984.

<sup>59</sup> Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ at 219, para. 5; also see *ibid* at 221, para. 15 saying “[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of a treaty.”

<sup>60</sup> For examples of arguments for the first three assumptions see Alexander and Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility’ at 984-989.

<sup>61</sup> See generally Knapp and Michaels, ‘Against Theory 2: Hermeneutics and Deconstruction’

<sup>62</sup> On the issue of the fallacy of textual identity argued by some postmodern deconstructivists see *ibid*

Virgil's poems) – as if they were Christian allegories.<sup>63</sup> It might seem absurd or even abhorrent to us to force such an erroneous interpretation on someone's poem but for one to understand how Vergil's poems came to be read in this way one has to also understand that for Christians in the Middle Ages "God's authorship of all human actions, physical and verbal"<sup>64</sup> since time immemorial was a natural assumption of being; it was undisputed and it animated all interpretation. When all human art is the expression of God's intentions working through the author it is not difficult to see how any piece of art (no matter how anachronistically and spatially divergent to the birth of Christianity) was seen as expressing an allegoric reading of Christian teachings and morals. Even more so, not only would such reading of Vergil's poems be possible but would also be compelling and accepted for such a reading would stem from the very underlying assumptions of how the world works and how art was/is/will be produced. Christian reading of poems and art came with its own assumptions, with its own methodology if you will, and the end result maybe absurd from our standpoint but it was normal, natural, accepted even required in the Christian world of the Middle Ages.<sup>65</sup> Even though we might think that this is an abhorrent case of wilfully misappropriating someone's text for our purposes that would not be the case for though we now know that Vergil did not write Christian allegories, Middle Ages Christians did interpret Vergil's poems; it is just that they started with assumptions of an author that we ourselves no longer share. Once those assumptions were changed and displaced with other assumptions about the world, about human beings as willing actors and about Vergil the author, the meaning of Vergil's poems changed and we may have differing opinions of what the meaning of Vergil's poems are, we are, nonetheless, sure that they are not Christian allegories.

And this brings us back to the empirical quandary that we in the legal profession face and to an extent share with Middle Age Christians since for them the empirical quandary was no less challenging – they still had to interpret texts written by somebody else and usually written some time ago and they still had to find

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<sup>63</sup> Generally see Stanley Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature' (1988) 97 *The Yale Law Journal* 777 as a reply to Posner's (hidden) advocacy for the law and economics method in adjudication see Richard A. Posner, *Law and Literature : A Misunderstood Relation* (Harvard University Press 1988)

<sup>64</sup> Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature' at 782.

<sup>65</sup> On the issues of what gives authority to an interpretation generally see Fish, 'Short People Got No Reason to Live: Reading Irony'; Fish, 'Wrong Again'; Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature'; Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, 'There Is No Textualist Position'; Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'

evidence of that author's intentions. Authorial intention was no less difficult or no less easy for that matter to discover centuries ago than it is now. For Middle Age Christians the underlying assumption was that God was the ultimate creator of all (past, present and future) art, and therefore, a poem or any other artistic expression was ultimately read as God's expression and consequently in relation to Christianity and Christian doctrine.

Contemporary international legal thought comes with its own assumptions about how to read a legal text and that is to assume (according to the ILC) that the text is the best evidence of the parties' intentions. Therefore, when one reads the text of a treaty one is to presume that it is written "with the ordinary meaning [...] [of] the terms of the treaty in their context and in the light of its [the treaty's] object and purpose."<sup>66</sup> And in the same way that the Middle Age Christian assumptions gave authority to the interpretation of Vergil's poems (for they are argued within the assumptions and conceptions of evidence peculiar to the geography and period in question), the assumption that a treaty was written using the ordinary meaning of terms given their context also conveys authority to an interpretation for the "legally relevant"<sup>67</sup> interpretation is the one that is produced and/or argued through the VCLT rule on interpretation. And if that interpretation forgoes the intention of the parties for the ordinary meaning of the terms then that is acceptable from the systematic perspective because a methodologically consistent interpretation brings about reliable, steady, predictable outcomes (or so the assumptions goes) and therefore *the* legally relevant ones.

However, forgoing the parties' intentions also means forgoing interpretation for in this case the interpreter is giving up discovering the meaning that the author(s) affixed to that text and is substituting the authors' meaning with a meaning produced in accordance with the ordinary meaning of the words taken in their context (understood narrowly and impoverished with strict limitations) and in light of the convention's object and purpose. In this case any overlap between the legally relevant interpretation and the original authorial meaning is left to chance for it will depend on the frequency of the parties' intentions to use words in their ordinary meaning (ordinary for who?) for if they did not do so and if the interpreter knowingly disregards this knowledge because it is not found in the VCLT approved

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<sup>66</sup> Article 31(a) of the , *Vienna Convention on the Law of Treaties*, United Nations, *Treaty Series*, Vol. 1155, P. 331.

<sup>67</sup> Commission, 'Draft Articles on the Law of Treaties with Commentaries' at 220, para. 8.

sources of information then the interpreter no longer deserves that name for she will no longer be interpreting but writing a treaty. Nevertheless an “interpretation” (not always deserving that word for it may or may not coincide with the meaning of a text given by its authors) that is produced in this way has legitimacy for it is produced (or argued for) under rules and processes and assumptions that are themselves (at this time) legitimate.

#### 4. THE DIFFERENCE BETWEEN INTERPRETATION AND JUDGING

Perhaps the best way to explain the difference between interpretation and judging would be to reiterate that arguing for the understanding that what a text means is what the author intends it to mean is not the same thing as arguing for what is today known as the intentionalist methodology of interpretation<sup>68</sup> for the argument that a text means what its author intends it to mean is not an argument for a methodology but a direction of inquiry, an inquiry that has to be conducted if one is to discover the meaning of a text. To explain the difference, I will modify another example used by Alexander and Prakash.<sup>69</sup> Let us suppose that my grandmother wants to come for a visit and she tells me over the phone that she would like me to move the “autobahn” next to the sofa. Now the ordinary and public meaning of the word autobahn is a German type of a highway and that if I believed that this is what my grandmother meant when she told me to move the autobahn next to the sofa then I would have to conclude that my grandmother has lost her wits and that it might be time for her to move in with my parents and be taken care of (in a non-mafia type way), or that she was still lucid but in great disillusion about my financial means and organizational skills. However, I know my grandmother better, and because I know that she has not lost her wits and that because her native language is not English (or German) and she makes frequent mistakes and because she likes to rest her legs when watching the television, I therefore know that when she said autobahn she meant ottoman. Assessing all of the evidence before me about my grandmother’s likely intentions when she uttered the word autobahn I know that she meant

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<sup>68</sup> Some explanation of what intentionalism is as well as an argument for a version of intentionalist methodology of interpretation see Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ at 511-514.

<sup>69</sup> Generally see Alexander and Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility’ at 978 and 994-995.

ottoman when she said autobahn, and this is the end of my interpretative task. Unfortunately, the ottoman is broken and it cannot be of any use to her in propping up her legs. Would I, therefore, still be doing interpretation if I were to substitute this (now correct) meaning – bring the ottoman in the living room – with the meaning – go and buy an ottoman – and would I still be doing interpretation if I were to understand the meaning of the sentence “bring the autobahn in the living room” as “go and buy an ottoman”? Clearly not, for what my grandmother intended to tell me was to bring the ottoman in the living room and not go out and buy one. It might not satisfy her goals of having somewhere to rest her feet, but that does not mean that she meant something else when she told me to “bring the autobahn in the living room.” It is a completely different question of whether I would be justified to go and buy an ottoman for her visit, for that question is a question of exercising proper prudence in executing the requests (commands) of somebody else (e.g. the legislature), if I were a judge and my grandmother the legislator it would be the question of what is to be the proper function of courts and what are they supposed and allowed to do, but it is not a question of interpretation for interpretation stops once we (believe we) have discovered the meaning (by finding the authors’ intention) of an utterance.

This example should make it clear that an interpretation of a text has done its interpretative work once we have a good idea of the intentions (and therefore the meaning) of the author(s) and what we do next once we have arrived at that interpretation is something completely different from interpretation, for the process of interpretation does not tell you what to do after you have completed the task of interpretation since new questions may arise (and different answers will be given then the one given to the question what do we do when we do interpretation) with the situation of what do we do when we do not like the meaning so discovered, or when we come to the conclusion that (as it may happen in international law) each party has meant something different when signing the text of the treaty then the other parties? What happens if the meaning of a legal text does not coincide with our (society’s) conception of justice? What happens if the intention of the parties do to laps of time or secrecy has been lost and no credible evidence exists for their intention? What is a judge to do if she is asked to apply a law that requires the death penalty for homosexuals? Would she still be interpreting if she were to “interpret” the text of the law not to require the death penalty understood as ending a person’s life but as ending a person’s romantic life (i.e. requiring social death) by requiring



that person not to engage any longer in homosexual sex? I think not, for what she would be doing is supplanting the meaning that the legislator gave to the law with the meaning that she gave to the law. She would be re-writing the text of the law rather than interpreting it, and if this re-writing was accepted by other judges and the community at large and becomes used in later cases as the law's meaning then she has thus become the author of the now new law and the author of the law is no longer the original legislator (parliament).<sup>70</sup> This may or may not be a legitimate outcome, depending on one's point of view regarding the proper role of courts – for this is a question of the proper role of courts – but this outcome is not an interpretative one, but it is a legal one.<sup>71</sup>

These are questions that the concept of interpretation cannot, and does not answer for the answer to these questions are found in concepts other than the concept of interpretation; concepts that have more to do with our basic understanding, assumptions and values of the legal and political system in question of which some rules of interpretation (not really interpretation at this point but rules of judging) might form a part of. For example, let's take the rules found in Article 33(4) of the VCLT since this provision answers the question what to do when the same provision in a treaty can be understood to have different meanings in different languages that not only evoke different meanings but different legal concepts. For instance, let us presume that the doctrines of murder in the US and France are different and that when these states decided to sign a treaty on extradition in two authentic languages each meant that the word murder (in French it would be assassin) meant what it means in their national jurisdictions. A judge faced with the task of judging a case arising under this extradition treaty would have a hard choice ahead of her once she came to the conclusion that the parties had intended (when they used the respective words murder and assassin) different legal concepts, but her choices would not be interpretative ones for her interpretative task has been completed once she has understood the provision in the treaty according to the intention of the parties (she has found the meaning) and, therefore, no more

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<sup>70</sup> Generally see Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, 'There Is No Textualist Position'; Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'; Knapp and Michaels, 'Against Theory'; Knapp and Michaels, 'Against Theory 2: Hermeneutics and Deconstruction'; Knapp and Michaels, 'Not a Matter of Interpretation'; Michaels, 'A Defense of Old Originalism'; Alexander and Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility'

<sup>71</sup> Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* more specifically see the essay *The Law Wishes to Have a Formal Existence*, pp. 142-179.



interpretation is necessary for the French speaking party meant the French doctrine of assassin when it signed the treaty and the English speaking party meant the US doctrine of murder even though they signed the same treaty authenticated in two different languages. However, this does not end the adjudicative task of our judge for she still has to come to a decision regarding the case and she has several options ahead of her like pronouncing that there was no agreement between the parties in this instance and that the case should be dismissed, or that because of the principle of double criminality the extradition should not move forward because what is murder in the US is not murder in France, or to follow the rule under Article 33(4) and assume that “in law there is only one treaty—one set of terms accepted by the parties and one common intention with respect to those terms—even when [the] two authentic texts appear to diverge”<sup>72</sup> and that, therefore, what she should do is adopt the meaning that “best reconciles the texts, having regard to the object and purpose of the treaty”<sup>73</sup> and, consequently, chose one meaning over another.

Note, however, that none of the options available to her are interpretative ones; they are rather legal options for the question of the meaning of the treaty provision (and now we know that that there are two treaty provisions because the intention of the parties diverge) has already been answered – for the US it means murder and the doctrine that it invokes and for France it means assassin and the doctrine that it invokes – and no amount of further interpretation will change the fact that the two parties had different intentions and therefore two different meanings. The answer might be that the French meaning of assassin fits better in the object and the purpose of the treaty and, therefore, that it should be the one governing the case but it is not the answer to the question what does the treaty provision mean, but it is the best option in this particular instance. And if our judge is successful in her argumentation that it is the French doctrine that should prevail and other courts or the parties themselves accept her argumentation and adjudicate in similar cases similarly then our judge would have successfully re-written the treaty provision (or created one since if there was no original agreement there was no treaty provision) and not interpreted it.

Nevertheless, some might argue that there is a difference between interpretation in international law or law in general and interpretation that happens in other disciplines or practices and everyday life. They would argue that in law

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<sup>72</sup> Commission, ‘Draft Articles on the Law of Treaties with Commentaries’ at 225 para. 6.

<sup>73</sup> , *Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, P. 331.*

different techniques and methodologies of interpretation have emerged and that the word interpretation is now more synonymous with judging since whatever outcome results from a judicial decision found in a judgment it will be called an interpretative one regardless of what interpretation means in other disciplines and that, therefore, insights from other disciplines are of no relevance and cannot shed any useful light on the interpretative/adjudicative (at this point insert word as appropriate) process. And certainly one can find support for this argument in recent writings about interpretation in international law.

For instance, let's start with the concept of restrictive interpretation. As has recently been noted by Luigi Crema<sup>74</sup> the concept of restrictive interpretation has gone through several shifts in its meaning and use over the centuries depending mostly on the underlying values that underpinned international law at the time.<sup>75</sup> Always couched in abstract, neutral terms "odious clauses are to be interpreted restrictively" its use changed over time depending on the value that underpinned the term odious. Vattel, for instance, included a list of examples and values that should give guidance to interpreters of when to interpret clauses restrictively and when expansively,<sup>76</sup> which included among others the common advantage, useful for human society, whatever contains a penalty, "whatever tends to change the present state of things" for example.<sup>77</sup> As international society changed together with its underlying values, the direction towards which restrictive interpretation tilted also changed and in the 19<sup>th</sup> and early 20<sup>th</sup> Century restrictive interpretation meant interpreting in favour of state sovereignty.<sup>78</sup> The second half of the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> Century has seen another shift of values and the canon of restrictive interpretation as understood in the previous two centuries is disappearing and new directions of restriction are emerging.<sup>79</sup> Crema concludes that "interpretation is not a disinterested application of rules"<sup>80</sup> but "value-oriented"<sup>81</sup> a fact which has been "explicitly admitted"<sup>82</sup> in the past and that despite its

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<sup>74</sup> Crema, 'Disappearance and New Sightings of Restrictive Interpretation(S)'

<sup>75</sup> Generally see *ibid*

<sup>76</sup> *Ibid* at 683.

<sup>77</sup> *Ibid* "In short, in the time of international law dominated by rationalist natural law what is now called the *restrictive interpretation* was not favourable to sovereignty; rather it was part of a reasoning which allowed for wider synthesis among the values that underlie (and are the aim) of international law." (emphasis in the original).

<sup>78</sup> *Ibid* at 684-686.

<sup>79</sup> *Ibid* sections 3 and 4.

<sup>80</sup> *Ibid* at 698.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*.

contemporary cloaking with “value-neutral statements”<sup>83</sup> and “rhetorical use of the Latin maxims”<sup>84</sup> it still remains to be so. Furthermore,

A firmly value-oriented interpretation can be accepted, tolerated, and justified in specifically defined phases in order to aid a new political consensus which encompasses a broader conception of human society, against an old *status quo* which failed to consider an important part of it.<sup>85</sup>

Very well put. However, one does have to notice a couple of things about what is understood under interpretation (albeit a restrictive one) for Crema, for he says that “[r]estrictive interpretation’ is the interpretative choice which restricts the meaning of a text. In an original sense, it is restrictive in favour of the real intentions of the parties, as opposed to what is expressed in a text.”<sup>86</sup> Clearly, for Crema, the text has meaning independent of what the parties intended and, as he understands the operation of this maxim, it is this meaning that has to be restricted in favour of upholding a certain value like fidelity to the parties’ intentions or to the interests of preserving sovereignty or to the interests of the international community and so on.

But that is partly the problem for he steps into the now all too familiar trap of thinking that a text’s meaning and the author’s meaning are something separate and that it is the interpreter who ultimately decides between them as well as between other meanings for he sees the original use of the maxim as an attempt to constrain an interpretation. Crema’s paper is a descriptive one, and it describes what he sees to be the process of interpretation which presupposes a free, unconstrained interpreter that can make anything out of a text (restrictive interpretation is ultimately a conscious “interpretative choice” not only between a text’s meaning and an authorial meaning but between different values as well) and therefore this interpreter needs to be constrained by tying her to specific values, originally to the meaning that the parties gave the treaty which later shifted to the list of values given by Vattel, which later shifted to the value of pro-sovereignty that is in flux today with a shift to values of pro-individuals and/or pro-international-society etc. And that is the problem of

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid at 682-683.

the concept of restrictive interpretation as described by Crema for it is interpretation left behind since it leaves any meaning (authors' or text's) side-lined since if interpretation is about finding a meaning (authors', text's, painting's) then restrictive interpretation is meaning (author's, text's) scaled back, a round peg squared so as to fit a specific and historically contingent value system. It is creating and assigning (giving) meaning rather than discovering. A more correct approach would be to say that *judging* "is not a disinterested application of rules"<sup>87</sup> and that it is "value oriented"<sup>88</sup> and that this process has been cloaked in "value-neutral statements"<sup>89</sup> and "rhetorical use of Latin maxims"<sup>90</sup> since what is actually going on is not interpretation but judging, of which interpretation is just one part/step.

Letsas has a similar position regarding interpretation of treaties and for him the object and purpose of the treaty is what gives us the guide as to what method of interpretation to adopt in the first place,<sup>91</sup> for as he puts it "how else could they [treaties] be interpreted" other than looking at the object and the purpose of a treaty.<sup>92</sup> The concept is simple, any statement of fact about what a treaty means is contingent on a value statement on why that statement of fact is relevant to the interpretation process if we are to avoid infinite regression.<sup>93</sup> When it comes to treaty interpretation, that value statement is the "*moral duty to respect and help states pursue their joint projects, other things being equal* (e.g. assuming the projects are unethical, etc.) (emphasis in the original)."<sup>94</sup> Consequently, the process of interpretation is a thoroughly evaluative process, where the meaning of the treaty is given by evaluating the different normative pursuits and deciding on the different weight that is to be given to each of them.<sup>95</sup> Treaty interpretation is an evaluative not an empirical exercise. Furthermore:

[F]or each treaty, the appropriateness of any interpretive technique depends ultimately on what project, as constrained by values of international law, states are taken to have agreed to pursue. There are no general methods of treaty

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<sup>87</sup> Ibid at 698.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' at 532-538.

<sup>92</sup> Ibid

<sup>93</sup> Ibid at 534.

<sup>94</sup> Ibid

<sup>95</sup> Ibid

interpretation, if by ‘methods’ we mean some set of fixed rules which takes the relevance of certain facts (e.g. preamble, state intentions, practices, etc.) as given.<sup>96</sup>

Moreover,

My [Letsas’] main thesis is that *treaty interpretation is fundamentally neither about the meaning of words nor about the intentions of states parties*. It is an inherently evaluative exercise in seeking to determine how fact-independent moral values normatively constrain the pursuit of states’ joint projects. The weight an interpreter should place on states parties’ intentions and on the text of a treaty depends on the moral character of the project which states seek to pursue. Different kinds of projects will call for different kinds of methods of interpretation. *To interpret a treaty is ultimately to interpret a moral value*. (footnote omitted)<sup>97</sup>

Where Crema starts with a conception of meaning(s) and a free interpreter but ends up with meaning left behind for (or at least squared up to) a certain value, Letsas does not even start from a concept of meaning for meaning has no role to play, and it has no role to play since courts are there to help states fulfil the projects they seek to pursue “because [of their] [...] moral duty to respect and help states pursue their joint projects, other things being equal.”<sup>98</sup> Most of the time this would mean sticking to the agreements that the parties reached (sticking to their “original” meaning as it were) but not always and especially not in the case of human rights treaties for in the case of human rights treaties the “abstract intentions” of the parties was to protect human rights in their morally abstract way for “[t]he truth of these general moral propositions does not depend on institutional recognition or communal acceptance”<sup>99</sup> and therefore, the moral meaning of these rights in their abstract is far

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<sup>96</sup> Ibid at 538.

<sup>97</sup> Ibid at 512.

<sup>98</sup> Ibid at 535.

<sup>99</sup> Ibid at 539.

more important than the very specific intentions that govern the meaning of the text of the treaty. Ultimately

If the purpose of international human rights law is to make states accountable for violation of some fundamental moral rights which individuals have against their government, then the purpose of human rights courts is to develop, through interpretation, a moral conception of what these fundamental rights are. It is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights. In order to fulfil this purpose, neither empirical inquiries into the consensus between states parties nor dictionary definitions are required.<sup>100</sup>

Letsas' account maybe an account of something, it certainly maybe be an account of how the European Court of Human Rights (ECtHR) adjudicates (comes to and justifies its decisions) but it is not an account of interpretation, it is not an answer to the question what do we do when we do interpretation. It is an account of judging, one that starts from the ECtHR and abstracts away to explain judging in other branches of international law. Furthermore, it is a justification for what is known as the "evolutive interpretation" or interpretation of a text as a "living instrument" used in many human rights courts, an "interpretation" that presupposes that there is a meaning of a legal text that is given by its authors and an interpreter is supposed to go beyond it, and this beyond, in Letsas' case, is towards a specific direction based on abstract moral values.

However, "evolutive interpretation" may be what courts actually do when they settle cases but it is not interpretation for it is no different from "restrictive interpretation" because the way restrictive interpretation works is that it restricts a meaning of an "odious" clause for the benefit of a certain value, while an "evolutive interpretation" "extends", goes beyond, the meaning of a text again in favour of certain (in this case, abstract) moral values. It is a step one does after one has finished interpreting, has found what the meaning of the treaty provision is and finds it lacking, and it is a step that gives meaning to the text of the convention thus at the same time re-writing it to fit the content of a perceived abstract moral value. It may

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<sup>100</sup> Ibid at 540.

be a good account of what courts, especially what human rights and international criminal courts do when they decide cases<sup>101</sup> but it is not an account of interpretation, it is an account of judging. If it were an account of interpretation then we would have to assume (if we ascribe to this account) that this process is the same one that states go through when they themselves interpret treaties - giving the meaning of a treaty provision that best fits their (abstract) moral values – which one has to admit is a recipe for disaster for it presupposes that, regardless of what the parties agreed, each one of them will give the meaning to a treaty provision that best suits them or their understanding of the international system's moral values and not the meaning to which the parties agreed. The question that begs to be asked is why even conclude treaties at all if every party will later “interpret” treaty provisions not according to the meaning that the authors gave it, but according to its own view of abstract moral values currently in place in the international system, or its view of the abstract moral values of the authors of the treaty. Clearly, this is not a coherent concept, at least not a coherent concept of interpretation but an account of and an instruction to judging.

But there are other accounts of what interpretation or rather what interpretative methodologies are, and we can find this in the writings of Grover<sup>102</sup> on the way that the international criminal tribunals have used interpretative methodologies. Where Letsas starts with a presupposition about what is interpretation, i.e. the evaluation of the compliance of the parties' agreement with abstract moral values (especially in human rights interpretation), Grover does not start from answering the question what is interpretation or what do we do when we do interpretation rather her aim is to establish a methodology of interpretation (not unlike the one set out in Article 31-33 of the VCLT) for international criminal law.<sup>103</sup> She understands a method of interpretation to “mean a systemic general approach to reasoning through the resolution of interpretative issues.”<sup>104</sup> Furthermore

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<sup>101</sup> See generally Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925

<sup>102</sup> Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’

<sup>103</sup> “The purpose of this article is briefly to review the state of the art before proceeding to introduce three fundamental interpretative dilemmas which, in the author's view, ought to be addressed before a method of interpretation for crimes in Articles 6, 7, and 8 of the Rome Statute is formulated and operationalized.” *Ibid* at 544.

<sup>104</sup> *Ibid* at 546.



A fully developed method has three tiers. It offers its user, in this case judges and lawyers in the field of international criminal law, the following levels of assistance: (1) a primary interpretative principle to guide their reasoning process when confronted with interpretative issues; (2) arguments or reasons which support this interpretative principle; and (3) a catalogue of materials of aims which must, may and, if applicable, may not be taken into account in support of those arguments.<sup>105</sup>

Grover does not define what these guiding principles are, but from the following paragraphs it becomes clear that, for her, principles of interpretation are the different approaches that courts have taken in the course of their adjudicative processes. For instance, she lists the “following principles of interpretation: literal, logical, purposive, effective, drafter’s intent, and progressive”<sup>106</sup> all of which have been used by the ICTY or ICTR at one point or another. The problem as she sees it is that these guiding principles “have [not] been authoritatively defined, and so their meanings vary through the jurisprudence [of the *ad hoc* tribunals] and sometimes overlap.”<sup>107</sup> And as she rightly observes “arguments supporting interpretative principles are not clearly connected to the interpretative principle to which they adhere”<sup>108</sup> all the more confusing the interpretative process and mixing up the guiding principles of interpretation and the justifications for their use in a specific case and context.<sup>109</sup> Coupled with the terse nature of the ICTY and ICTR statutes it is not surprising that the “jurisprudence of the ICTY and the ICTR [has] not yielded a prevailing hermeneutic for international criminal law.”<sup>110</sup> Hence Grover’s search for a method, and not just any kind of method, but a neutral one, one that can stay away from any substantive point of view or value and be able to achieve the procedural justice ideal toward which international criminal law strives with the creation of the International Criminal Court.<sup>111</sup> It is clear that in Grover’s view, a proper

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<sup>105</sup> Ibid

<sup>106</sup> Ibid at 547-548, footnotes omitted.

<sup>107</sup> Ibid at 549

<sup>108</sup> Ibid

<sup>109</sup> “For example, judges have used the principle of literal interpretation to endorse arguments favoring both strict and broad interpretations of impugned words. On other occasions, bald statements about the prudence of adopting a broad interpretation of a phrase, for example, are not buttressed by an explanation about how this argument achieves the greatest faithfulness to a particular interpretative principle (e.g., progressive interpretation, effective interpretation).” Ibid

<sup>110</sup> Ibid

<sup>111</sup> See the discussion under the heading titled “Normative Dilemma” ibid at 550-

methodology, a neutral methodology, will cure the deficiencies of the substantive justice approach of the *ad hoc* criminal tribunals – the bedrock of contemporary international criminal justice – and will allow the ICC to deal with the challenges of arbitrariness and victors’ justice hurled at the *ad hocs*.

Unfortunately, Grover herself points out the difficulties of this search for a methodology in her section titled “normative dilemma”.<sup>112</sup> She does a marvellous job of explaining and contextualizing the normative births of international criminal law – the tri-lateral influences of human rights, humanitarian and domestic criminal law – as well as the debates of substantive justice versus strict legality, but it seems that she has missed the insights of her own analysis. For instance, she points out the (in concept) different objects and purposes that international human rights and criminal justice favour by saying that “while the object and purpose of criminal justice favours the strict construction of statutes, the object and purpose of international human rights instruments is invoked to justify generally broad interpretations of crimes to ensure that ‘harms are recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom’,”<sup>113</sup> while in the next sentence pointing out that the conflicting nature is not so conflicting at least in the case where the rights of the accused are also human rights.<sup>114</sup> A similar back and forth is presented in the broader or narrower protection of individuals in human rights or humanitarian law while at the same time acknowledging that “international human rights has had a ‘humanizing effect’ on international humanitarian law” and that “many international crimes initially ‘emerged directly from’ international humanitarian law or were at least characterized as such.”<sup>115</sup> But nevertheless the bond between international criminal law and international human rights law is strengthening. The apparent tension is not so apparent it seems.

A similar back and forth repeats itself when it comes to the discussion of substantive justice and strict legality (or procedural justice). It first starts with describing the (apparent) tension between the two concepts – namely that the substantive justice concept requires that wrongs should be punished regardless of whether those wrongs were laid down in the law or not at the time of the commission and that the strict legality concept “purports to punish an individual

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<sup>112</sup> Ibid

<sup>113</sup> Ibid at 550.

<sup>114</sup> Ibid at 551.

<sup>115</sup> Ibid footnotes omitted.

only for acts which were criminal when performed so as to protect individuals against the harsh and arbitrary exercise of state power”<sup>116</sup> – and then goes on to relieve that tension by saying that

“[w]hile most criminal law jurisdictions have adopted a doctrine of strict legality in theory, and invoke it to justify the principle of legality, considerations of substantive justice have, in practice, qualified the principle’s application in absolute terms ... [and] that, like domestic criminal law jurisdictions international criminal law cannot adhere to strict legality doctrine absolutely.”<sup>117</sup>

Consequently, “the legality principle applied at the international level may therefore be ‘subject to a number of significant qualifications.’”<sup>118</sup> This, and other instances throughout her paper (the difficulties with treaties over time and their relationship to customary law, the necessity for “catch-all” phrases) show the difficulties of searching for a method, at least of the kind that Grover aspires, which is a neutral one, one that mediates between but is not beholden to any of the normative directions that inform international criminal law.

Unfortunately for Grover, such a method cannot exist since a place that is not informed by any particular context, or any particular point of view cannot exist for we are always and already situated in a context and a point of view<sup>119</sup> and there is no neutral perspective from where to construct such a method. Certainly a method is possible, one that is full of abstract principles, like the strict legality principle (which among other things requires that judges not make or update the law) but as Grover has wonderfully shown in her paper they simply are of no help when it comes to guiding the practice of judging as well as the empirical task of interpretation and that

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<sup>116</sup> Ibid at 554.

<sup>117</sup> Ibid

<sup>118</sup> Ibid at 555.

<sup>119</sup> This argument comes from the line of legal and philosophical pragmatism and for more on this philosophical thought see Knapp and Michaels, ‘Against Theory’ at 736-742; Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*; Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too*; Fish, *The Trouble with Principle*; Stanley Fish, ‘Truth but No Consequences: Why Philosophy Doesn’t Matter’ (2003) 29 *Critical Inquiry* 389; Richard Rorty, *Essays on Heidegger and Others* (Cambridge University Press 1991); Richard Rorty, *Objectivity, Relativism, and Truth* (Cambridge University Press 1991)

in practice what we have in terms of methods are rules of thumbs,<sup>120</sup> rules that are very much connected to the specific contextual situations in which judges engaged, not unlike the ones described by Grover herself in her excellent account of how judges have, dependent on the circumstances at hand, used and shaped methodology (wholly in its now weak form) by practice over time. Nothing in her paper offers a glimpse of what this neutral methodology might look like. What it does offer is plenty of arguments of why judges should not strive for developing a kind of methodology that Grover sets out to create, for she herself has given many rules of thumb suggestion to judges, like if customary law is more progressive than the substantive crimes of the statute then judges should be informed in their decisions by it; or if customary human rights norms offer a better protection of the defendant's procedural rights then judges should take them into account and decide accordingly, or when the Rome Statute crimes conflict with human rights like the example of hate crimes and incitement to genocide – for which she offers six arguments why Article 21(3) would best be served to be read one way instead of another (in which the intent of the parties is only one, albeit the first, argument)<sup>121</sup> but not one of those suggestions are neutral in the sense uninformed by the normative strains to which international criminal law is beholden to. A methodology could never give Grover what she wants – a neutral set of hard rules that if applied would lead to a neutral interpretative solution – for as she demonstrates herself the rules would either be in favour of the accused, or in favour of the victims and harms that need to be remedied, be informed by humanitarian concerns or concerns for legality and procedural justice, for the term best can only be seen as best if viewed from a certain point of view, one that is historically and socially contingent, one in which we are always and already in and therefore in no need to define it,<sup>122</sup> but to argue for it or against it not from a neutral position but from the partisan and contingent

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<sup>120</sup> Knapp and Michaels, 'Against Theory'; Knapp and Michaels, 'Against Theory 2: Hermeneutics and Deconstruction'; Knapp and Michaels, 'Not a Matter of Interpretation'; Stanley Fish, 'Consequences' (1985) 11 *Critical Inquiry* 433; Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature'; Stanley Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' (1990) 57 *University of Chicago Law Review* 1447; Stanley Fish, 'Theory Minimalism' (2000) 37 *San Diego Law Review* 761; Fish, 'Truth but No Consequences: Why Philosophy Doesn't Matter'

<sup>121</sup> Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' at 561-563

<sup>122</sup> When I say in no need to define it I mean in no need to define it as a prelude to changing it for whether we discard or keep one set of convictions, one set of points of view or another set will depend not on whether we are more or less aware of our point of view but whether we are convinced by the correctness of one or another points of view.

position we are always in,<sup>123</sup> as Grover herself is masterfully doing in her paper. The ILC clearly pointed out in their Commentaries the contingency and contextuality of interpretative principles and maxims by saying

Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. *They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science. (emphasis is mine)*<sup>124</sup>

One can see the contextuality and situatedness of interpretative approaches in a good paper by Lixinski talking about the way that the Inter-American Court of Human Rights (IACtHR) has used the Vienna Convention rules to expand the coverage of the American Convention on Human Rights (ACHR).<sup>125</sup> The IACtHR, using the mandate given to it in Article 29 of the ACHR has expanded its reach in areas not envisaged by the drafters of the convention. It has, [r]eferring to the International Court of Justice's Namibia Advisory Opinion [...] said that international legal instruments should always be interpreted in light of the normative framework

<sup>123</sup> Generally see Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*; Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

<sup>124</sup> Commission, 'Draft Articles on the Law of Treaties with Commentaries' at 218 para. 4.

<sup>125</sup> Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law'

in force at the moment the interpretation is done” and therefore, “rejected any ‘historical’ interpretations.”<sup>126</sup> Furthermore, the IACtHR has taken a so called *pro homine* approach to interpretation, i.e. that the provisions of the ACHR are to be interpreted

in a way which is most protective of human rights. This declared ‘bias’ of the Court is another means of advancing interpretation in accordance with the purposes of the treaty: by choosing the *pro homine* way, the Inter-American Court dismisses the interpretation of its instrument according to the ordinary meaning of its words (the primary rule of interpretation [of the Vienna Convention]) or any other traditional canons of interpretation, instead directly serving the teleology of the interpretation.<sup>127</sup>

Consequently, “[t]his means that the specific rules on interpretation of the Convention are instrumental in nature, and not substantive, as a rule on interpretation should be”<sup>128</sup> and that the IACtHR “has rejected interpretations which aim at looking for the ‘original intent’ of an instrument, rather asserting that the normative context of a rule at the moment it is interpreted should be the key factor.”<sup>129</sup> All very well, however, given these statements one wonders what Lixinski means by rules of interpretation as being instrumental but not substantive since a rule that is instrumental, i.e. wants to achieve a certain goal must also be substantive because it comes from a substantive point of view, not a neutral and procedural one. If Lixinski means that interpretative rules/methodologies are neutral tools that can be used to achieve any end then that would go in the face of his analysis since it would not be necessary to adopt a specific approach to interpretation – any would do and no need to argue for and justify that adoption for all methodologies can lead to any desired outcome. There is no need to choose between a historical or *pro homine* or any other approach for either would do.

On the contrary rules of interpretation are both instrumental and substantive, they are substantive because they have a specific content behind them (if you find

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<sup>126</sup> Ibid at 588.

<sup>127</sup> Ibid

<sup>128</sup> Ibid.

<sup>129</sup> Ibid at 588-589

yourself in a situation like this then do that – a rule of thumb) and they are instrumental because they have a purpose behind them and are there to achieve something (stick to the drafters' intentions, sensitivity to individuals rather than states – being *pro homine*, taking care of the unity of international law etc. or a combination of the above). For instance, the rule 'odious clauses should be interpreted restrictively' may be drafted as a neutral and instrumental rule for the term odious can mean anything (neutral) but it is instrumental because it is geared toward restricting something which is odious. However, this rule would be impossible to use without filling in the content of the word odious for without any substance to the word odious the rule can be used for anything and can be an instrument of any purpose. But once one fills it with purpose, once one specifies what is the thing that is odious, the rule becomes a substantive one for it now has a specific content. A neutral rule cannot resist any imposition of substance to it making it neutral until one decides to marshal it into one's service. Once the interpreter marshals it, and does it so successfully it loses its neutrality.

After reviewing the way that the IACtHR has used its *pro homine* approach in specific topics,<sup>130</sup> Lixinski concludes that the

Vienna Convention is used by the Court [IACtHR] as a means to establish its connections to general international law, but at the same time the Court makes it clear that the human rights system is separate from, and even arguably superior to general international law. Instead of using the Vienna Convention's basic tenet of interpretation in accordance with the ordinary meaning of the words of the treaty (first part of Article 31(1) of that instrument), the Court uses the teleological tool referred to at the end of the same provision of the Vienna Convention.<sup>131</sup>

Furthermore, the IACtHR has "systematically invoked treaties outside the [...] system as a means to expand its jurisdiction" while at the same time "more politically delicate contexts, such as indigenous rights and economic, social, and

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<sup>130</sup> I.e. in International Humanitarian Law, Environmental Law, Minority/Indigenous protection, investors' rights and Economic, Social and Cultural rights, *see* *ibid* at 590-602.

<sup>131</sup> *Ibid* at 602-603.



cultural rights, municipal law (or internalized international treaties) seems to play a larger role in interpreting the American Convention” while still at other times, “such as international humanitarian law, the [IACtHR] has more easily referred to other international treaties as interpretative aids, but it has also shown some reluctance at invoking international criminal law, using it only as part of the ‘factual matrix’ of the case.”<sup>132</sup> Moreover, “the use of foreign instruments is more often than not a search for external validation rather than an actual excursion in waters not charted by the American Convention. New dimensions are added to pre-existing rights, but rarely does the [IACtHR] actually engage in creating new rights.”<sup>133</sup> Nevertheless, despite or even because of the IACtHR progressive stance on human rights, the Court itself “is checked by moderate concerns to accommodate more sensitive subjects [...] in its quest for greater human rights protection, which bears in mind that having states as part of a system and applying with decisions is every bit as important as progressive, *pro homine* interpretation”<sup>134</sup> of the ACHR.

Lixinski’s paper and his insights is a great example of how courts use interpretative methodologies/rules in a contextual way as well as on the nature of interpretative rules as such. They are instrumental and substantive; they are tied to a specific purpose, in the IACtHR’s case to the purpose of achieving a greater human rights protection for the individual. But like the normative trilemmas of international criminal law, the IACtHR has to balance its humanistic, *pro homine* approach with a desire to have as many states on-board the Inter-American system. As such, the IACtHR has used the tactic of relying on other international instruments to support its decisions. It has divorced the third prong of the Vienna Convention Article 31(1) rule from the rest and masked its decisions in the familiar object and purpose methodology. In short what it has done is followed the contingent and contextual rule of *pro homine*, unless another important factor enters the mix, like keeping convention states in the convention regime, at which point municipal law rather than international law is the one that becomes ‘informative’. It is not that the Vienna Convention rules provide for any constraints on interpretation, they are actually marshalled in towards the expansion of the ‘meaning’ of an instrument. Rather, the constraint of the IACtHR is more institutional in character<sup>135</sup> that has more to do with

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<sup>132</sup> Ibid at 603.

<sup>133</sup> Ibid at 604.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid at 603-604.

the tug and pull of the system itself and the IACtHR's surroundings and conceptions of its place and role.

Another such excellent account of judging – which as I claim is also mistaken for interpretation – is the recent book written by Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*.<sup>136</sup> Van Damme starts out somewhat well when she says that

Interpretation presupposes an authoritative text, something authored from which the text receives its particular status as law. Treaty interpretation comprises finding the meaning of the actual language of the treaty [...]<sup>137</sup>

Hence, interpretation is the process by which we arrive at the meaning of an authored text and comes before applying that text as law to a particular fact situation.<sup>138</sup> Furthermore, interpretation is a holistic process, quoting Abi Saab who talks about interpretation as

one integrated operation which uses several tools simultaneously to shed light from different angles on the interpreted text; these tools should not be seen as watertight compartments or as a series of separate sub-operations but, rather, as connected (even overlapping) and mutually reinforcing parts of a whole, of a continuum or a continuous and multifaceted process that cannot be reduced to a mechanical operation and which partakes as much of art (the art of judgement) as of science (the science of law).<sup>139</sup>

Moreover, “[p]rinciples of treaty interpretation are neither rules, nor principles in the classic sense of ‘something [...] which underlies a rule, and explains or provides the reason for it’. [...] They help answer why a rule is to be given one meaning and not

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<sup>136</sup> Van Damme, *Treaty Interpretation by the Wto Appellate Body*

<sup>137</sup> Ibid at 73.

<sup>138</sup> Ibid at 32.

<sup>139</sup> Abi Saab, G., as quoted in ibid at 33.

another.”<sup>140</sup> And finally, “principles of interpretation are ‘principles of logic and good sense’ that guide the interpreter in finding *and justifying* the meaning of the language used in a treaty.”<sup>141</sup> So far so good, interpretation needs a text that is authored and the principles of interpretation (which are not hard and fast rules of interpretation but something to be used in a holistic process that is contextually and situationally contingent) help guide the interpreter in discovering the meaning of a text. Wonderful nuggets like these continue throughout the book like for instance the paragraph in which she says that

Discrepancies exist in the manner in which courts and tribunals explain and justify how they interpret the treaty language. But even if they articulate in clear terms their interpretative practice, it is less common for adjudicators to specify the reasons for preferring certain principles of interpretation to others. *An analysis of any court’s interpretative practices relies on a degree of pragmatism shown in its decisions. There is no guarantee that a judgment discloses all the principles applied, all the elements of interpretation taken into account, and the weight given to the latter.* In most cases, interpretation is also a ‘matter of judicial instinct’, and an indeterminate process to arrive at a determinate meaning of a legal text.<sup>142</sup> [footnote omitted, emphasis is mine.]

Or that “it is hard to conceive how the process of interpretation can be governed by legal rules in the ordinary sense of the term, as relatively determinate directions to a given result”<sup>143</sup> and therefore “it is difficult to set out a clear ‘trajectory’ of treaty interpretation, that is, the different steps in the process. The interpretative practices of international courts and tribunals cannot easily be analysed into distinct schools of interpretation.”<sup>144</sup>

Sadly, Van Damme, even after these wonderful insights, still manages to fall in the now all too familiar trap of distinguishing authors’ meaning with a text’s meaning and this becomes evident when she talks about the different schools of

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<sup>140</sup> Ibid at 34, footnotes omitted.

<sup>141</sup> Ibid footnotes omitted, emphasis is mine.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid at 35.

<sup>144</sup> Ibid

interpretation for while she explains the emphasis of the different schools and gives a good account of the intent based school of interpretation, i.e. that “[t]he claim that ‘[t]he intent of the parties ... is the law’, and the belief that interpretation ‘is the search for the real intention of the contracting parties in using the language employed by them’ undoubtedly reflect the orthodox wisdom underlying treaty interpretation” and that “interpretation is about finding the intentions of the parties; this is undisputed”<sup>145</sup>, she also disregards the intent based account of interpretation because it “answers little or nothing to questions such as whose intention, what was intended, and at what time that intention matters”<sup>146</sup> and because “they are insufficient to interpret a specific treaty provision in its context.”<sup>147</sup> The usefulness of an entire account to interpretation is discarded not because it is true or not or whether it gives an accurate description of what we do when we do interpretation (search for the intention of the parties) but because it does not give an interpreter any useful guidelines, rules and/or advice on how to proceed with interpreting an authored text. It is ultimately where the hope in interpretative methodology talk lies, in having and giving steps to judges that can be followed and therefore constrained; it is a version of paint by numbers where the tough choice of judging would be done by somebody else – an impersonal methodology – and not the judge for the view of a judge having a choice in the matter is frightening. And if judges do have a choice then lets tie them down to steps, to methods and neutral abstract principles and let them paint by numbers.

Unfortunately, no account, at least no accurate account of interpretation can give one predefined steps to take in order to find the intentions of the parties in every and all cases; it cannot give one a methodology in the sense searched after by Grover, for what an accurate account of interpretation can give us is a notion of what interpretation is, not how to do it. It can give us a direction and not pre-defined steps to take, it can give rules of thumb dependent on situations and contexts and not context free, neutral methodologies that will ultimately turn out to be flawed, for interpretation is something one does regardless of the account that one has of it. It comes with experience amassed while conversing with other people, it comes from the experience of reading books, writing letters and emails, and when it comes to the particularities of a specific profession like law, it comes from the experience gained

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<sup>145</sup> Ibid at 36.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

from going to law school, reading judgments, understanding topics such as law, justice, states, state parties, international agreements, wrongful acts, international crimes etc., etc., for this experience will tell you whether one source of evidence about the intention of the parties is credible or not. And if it is credible evidence, then an interpreter can have no other choice but to take it into account if interpretation is what she is set out to do for once one discards credible evidence for the intentions of the author one discards interpretation and starts doing something else which may or may not be part of the process of judging, and may or may not be its legitimate part.

At a certain point a conundrum appears: what does Van Damme mean when she says that principles of treaty interpretation “are principles of logic and order that both constrain and empower the interpreter.”<sup>148</sup> A charitable interpretation that can be constructed from the paragraphs surrounding that statement would be that rules of interpretation, which are not hard and fast rules but principles of good sense, empower the interpreter by providing her with grounds of “justification, tools to build credibility and assert [her] judicial function [...] and aids to making [her] decisions acceptable and comprehensible”<sup>149</sup> and that they are and have been, when it comes to the WTO Appellate Body at least, “instrumental in justifying and making acceptable its early choice to function as a court and thus to build its legitimacy as a judicial actor.”<sup>150</sup> They would constrain the interpreter, however, by “providing guidance [...] [by being] instruments to achieve accountability, [and] as techniques to order and structure their reasoning process.”<sup>151</sup> This, in a sense, is no different from the first prong that Grover says any good methodology must fulfill i.e. “to guide [the interpreter’s] reasoning process when confronted with interpretative issues.”<sup>152</sup> In this sense, the premise of the constraining nature of methodologies/principles of interpretation is that they represent a check on the less gentle natures of the interpreters so when they are confronted with an interpretative issue they will take the pre-defined steps set out in the Vienna Convention Articles 31-33 (or any other methodologies) to arrive at the meaning of the text or that when an interpreter sits down to interpret a text she goes through an imaginary procedure where she ticks a box with headings like “good faith” (check), “ordinary meaning” (check), “context” (check) after every treaty phrase read/interpreted. In a related article Van Damme

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<sup>148</sup> Ibid at 381

<sup>149</sup> Ibid

<sup>150</sup> Ibid at 382.

<sup>151</sup> Ibid at 381.

<sup>152</sup> Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ at 546

states that “[i]t is expected that a judicial body, considering disputed terms in a treaty, arrives at its interpretation of the terms by reference to established principles of treaty interpretation.”<sup>153</sup>

Unfortunately for Van Damme, this is not what is going on when one arrives at a judicial decision for it is not arrived by references to established principles of treaty interpretation but rather it is argued through them as well as through other legal concepts. It is what Albie Sachs has called the Tock of the judicial clock coming before the Tick, the notion that “every judgment I write tells a lie against itself”<sup>154</sup> because the “orderly, clear, sequential narrative form”<sup>155</sup> of a written judgment is in essence the opposite of the process of arriving at a decision, it is the process of justification rather than the process of thinking through a problem.

This, then, is the falsity: [Judge Sachs writes] the pretence implicit in the presentation of a judgment that it has been written exactly in the way it appears. All hesitations, sometimes even reversals of positions on certain points, have been eviscerated from the final version. All to-ing and fro-ing in the process of its construction has been eliminated. Completely left out of account is the complexity of the process by which the final reasoned decision has been arrived at. In sum, the final format of the judgment belies the manner in which it has been produced.<sup>156</sup>

In the end what we are left with in the judicial written opinion is the judges’ best **legal** justification of their decision, for like other legal doctrines and concepts their absence in a judicial decision would render it legally incomprehensible, unable to be recognized as such by the rest of the legal profession and if a judge were to justify her decision using concepts unrecognizable to the legal profession (like the lack of a iambic pentameter or the lack of character development in the losing sides written submissions) then that judge would rightfully receive the scorn of her peers for what she would have done is not “doing law” but “doing” something else. It is

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<sup>153</sup> Van Damme, ‘On ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the Wto Dispute Settlement Understanding’--a Reply to Professor Chang-Fa Lo’ at 237.

<sup>154</sup> Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press 2009) at 47.

<sup>155</sup> Ibid

<sup>156</sup> Ibid at 51.

my claim that at most what methodologies can accomplish regarding constraint of interpretation is to put the interpreter in a mind-set that what one should watch out is ordinary meaning taken in its context together with and the object and purpose i.e. to read a treaty as it was an authored legal text and not a painting or a sculpture. Once one realizes that there is no place where these suggestions can go beyond the point of putting the interpreter in a mind-set that what one is reading is a **legal** text authored by somebody who has a purpose and a message written down in the form of a text (and this is already a long way into an interpretation), methodologies about reading texts become useless in reading them.<sup>157</sup> Once one interprets a text as a treaty one cannot but see something in the context of the law and having a purpose to regulate something in one way or another. One cannot know what the ordinary meaning of a word in a treaty is if one has not previously also learned what a treaty is, what states are, what is the basic structure of the international system, what states do and what they are for, in essence without the knowledge gained by going through a very specific training that one receives by being a member of a specific profession, that of an international lawyer or scholar. And here in the end we come again at the difference between interpretation and judging for judging involves more than just finding out what a text means but it involves arriving at a decision that is seen just and legal according to changing and contestable standards of justice and legality.<sup>158</sup>

## 5. CONCLUSION – THE CONSTRAINING NATURE OF *LEGAL* INTERPRETATIVE METHODOLOGIES

If interpretative methodologies cannot deliver what they promise, if they cannot deliver hard and fast rules that would take the discretion out of interpreters when interpreting texts, if rules of interpretation, like the additional rules of interpretation regarding the use of dictionaries as proposed by Professor Chan-Fa

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<sup>157</sup> Fish, 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism'; Fish, 'Wrong Again'; Fish, 'Still Wrong after All These Years'; Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature'; Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*; Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence'; Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too*; Fish, *The Trouble with Principle*; Fish, 'There Is No Textualist Position'; Fish, 'Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law'

<sup>158</sup> For instance see Samuel C. Rickless, 'A Synthetic Approach to Legal Adjudication' (2005) 42 San Diego L Rev; and Chapters 9 and 10 of Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010)



Lo,<sup>159</sup> cannot even spell out the terms of their own interpretation<sup>160</sup> then can we say that interpretation, and through that extension judging, is a wholly unconstrained “anything-goes” activity? I would argue not, and not because methodological rules (like rules of interpretation) cannot “spell out the conditions of their own application”<sup>161</sup> but exactly because they are **legal** methodologies that they do their constraining work and they do this work no differently than any other legal doctrine.

As Fish has said

[the] conclusion that might seem to be the one I, myself, was moving toward in the course of presenting these examples, for surely the moral of *Columbia Nitrogen* ... (and countless others that could be adduced) is that the parol evidence rule is wholly ineffective as a stay against interpretative assaults on the express language of contracts and statutes. But the moral I wish to draw goes in quite another direction, one that reaffirms (although not in the way formalist will find comforting) the power both of the parole evidence rule and of the language whose “rights” it would protect, to provide meaningful constraint on public and private conduct.” It is certainly the case that *Masterson v. Sinne*, like *Columbia Nitrogen* and the others, indicates that no matter how carefully a contract is drafted it cannot resist incorporation into a persuasively told story in the course of whose unfolding its significance may be altered from what it had seemed to be. But the same cases also indicate that the story so told cannot be any old story; it must be one that fashions its coherence out of materials that it is required to take into account. The important fact about *Masterson* is not that in it the court succeeds in getting around the parol evidence rule, but that it is the parol evidence rule – and not the first chapter of *Genesis* or the first law of thermodynamics – that it feels obliged to get around. That is, given the constraints of the institutional setting – constraints that help shape the issue being adjudicated – the court could not proceed on its way

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<sup>159</sup> Lo, ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the Wto Dispute Settlement Understanding’; Chang-Fa Lo, ‘A Clearer Rule for Dictionary Use Will Not Affect Holistic Approach and Flexibility of Treaty Interpretation—a Rejoinder to Dr Isabelle Van Damme’ (2011) *Journal of International Dispute Settlement*; Van Damme, ‘On ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the Wto Dispute Settlement Understanding’--a Reply to Professor Chang-Fa Lo’

<sup>160</sup> See for instance Fish, ‘Fish V. Fiss’

<sup>161</sup> Martti Koskeniemi, ‘Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization’ (2006) 8 *Theoretical Inquiries in Law* 9 at 9.

without raising and dealing with the parol evidence rule (and this would be true even if the rule had not been invoked by the eager trustee); consequently, the *path* to the result it finally reaches is constrained, in part, by the very doctrine that result will fail to honor.<sup>162</sup>

Consequently, legal methodologies of interpretation do their constraining work not by being true to their promises of making legal interpreters stick to the meaning of a text or by providing explicit meanings, but by providing us with, as the Commission's crucible approach, legally relevant interpretation for a legally relevant interpretation in international law will be the one that is partly argued through the interpretative doctrines currently in play at various international courts – the ICJ, ECtHR, ECJ, IACtHR, HRC – clear textual meaning, object and purpose, context, subsequent state practice, evolutive interpretation, the living instrument, margin of application and if these and other legal concepts are not found in a judicial opinion then it would be hard to see what is the judicial in the judicial opinion. And this is where the paradox of interpretive methodologies or doctrines lay, they create constraints not by providing the thing that they promise – a series of steps that one can take to do the interpretative job – but by providing areas around which argumentation and justification can take place, for only certain type of arguments will be seen as persuasive some of the time but not all types of arguments all of the time thus providing stability and openness to change at the same time and what determines this stability and openness is contextual – it depends on the judicial regime, its surroundings, its point in its existence, on the purposes and principles behind that regime, the quality of the judges sitting on the bench, etc. etc. etc. – and probably most importantly what has been called having “a legal mindset”.<sup>163</sup>

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<sup>162</sup> Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* at 151. (footnotes omitted.)

<sup>163</sup> Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9

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